profit Mulvey made on home improvement loans acquired through petitioner (Tr. 206). This share came to between sixteen and twenty thousand dollars (Tr. 233).

2. At the conclusion of the first government witness' direct testimony, petitioner's counsel, in the presence of the jury, requested "any 3500 statements" (Tr. 59). He stated that "in the future it would save a lot of time if they would give us those statements in advance at the beginning and we wouldn't have to ask for recesses" (Tr. 59–60). The court granted a short recess then instructed the jury (Tr. 61):

> All right. The best thing to do—and we won't have this happen again because the government will produce the statements, Lady and Gentlemen of the Jury, that they have in their possession, if any there is, taken from witnesses who are going to testify on behalf of the Government, because under the law the attorney for the defendant has a right to examine those statements before he begins his cross-examination of the witness, so Mr. Raqano has a right to examine this five-page statement that this witness apparently has given to the Government before he starts on his cross-examination, but we are going to avoid that difficulty from now on out because the government is going to furnish them the statement as the witness comes to the witness stand, see, but we'll take a recess for 10 minutes * * *.

Thereafter, in a discussion outside the presence of the jury, the government agreed simply to place a copy of any statement on defense counsel's table prior

to a witness' direct testimony (Tr. 61–68).[2] The trial judge was concerned with the considerable delay that would be engendered were he to ask the jury to leave the courtroom every time a statement was produced (Tr. 65). He stated that, since he had already been required to explain the necessity for producing statements, the agreed procedure would avoid "making a mountain out of a molehill and get[ting] into matters that are collateral to the principal issues here" (Tr. 69).

ARGUMENT

1. On the appeal from petitioner's first conviction, petitioner contended that the government had not proved that he possessed an intent to defraud. The court of appeals concluded that the statute encompassed the conflict of interest situation presented here, and approved the charge given on the issue of intent (Pet. A–19).[3] The court held that fraudulent purpose existed under the statute whether the objective was

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[2] The trial judge remarked that this procedure provided an advantage to petitioner since 18 U.S.C. 3500 requires the statements to be turned over *after* the conclusion of a witness' direct testimony (Tr. 65).

[3] "You will note that the acts charged in the indictment—information are alleged to have been done with 'intent to defraud.' However, the evidence need not show that the United States or anyone else was actually defrauded, but only that the accused acted with the 'intent to defraud.'

"To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self."

In essence, this same instruction was used at the second trial (Tr. 785).

to obtain an advantage, or to cause the principal to suffer a loss. In these circumstances, there is no merit to the claim that "the Indictment failed to inform Petitioner of the accusation against him" (Pet. 16). Whatever his expectations at the first trial, petitioner clearly knew after his first appeal what would be required of the government at the second trial. Accordingly, he was afforded sufficient opportunity adequately to prepare his defense.

2. During the trial, Beaudine's counsel asked him the following question:

> Have you ever during your association with the Clearwater Federal Savings and Loan Association done any act with the intent to injure and defraud that Association?

The government lodged an objection to the form of this question, contending that it was cast in terms of legal art; the objection was sustained. As the court of appeals noted, the specific question was defective because it "was extremely broad in form" (Pet. A–6). And, while petitioner did not seek to rephrase the question, he did avail himself of the full opportunity to testify as to his intent. He stated that he had never approved any loan applications for Clearwater Federal Savings and Loan Association that he felt were harmful to the association or improper in any fashion; that he had never been in partnership with Mulvey, directly or indirectly; that he never received any kickbacks from Mulvey directly or indirectly; and that he had never offered to make an illegal or bad loan to anyone (See Tr. 576, 552, 554, 567–568, 573–574, 591–592).

3. On direct examination Mulvey testified that he had previously been convicted of four felonies—in 1934, 1936, 1948, and 1960—including breaking and entering, theft of an automobile, and defrauding the government in connection with FHA loans (Tr. 237–240). On cross-examination petitioner's counsel asked whether Mulvey had not been convicted of seven rather than four felonies (Tr. 243). Counsel requested the government to produce an FBI record to aid this line of impeachment. The court denied this motion, stating in effect that it was up to petitioner to try to prove that the witness had been convicted of the other felonies (Tr. 245). Subsequently, a subpoena duces tecum was served on a special agent of the FBI who had been present during the trial. After a hearing, the court ordered the government to produce the record for the court's inspection *in camera* (Tr. 486); it then ordered the government to turn it over to counsel for petitioner (Tr. 488). Mulvey was subsequently cross-examined by use of this record. He admitted having been convicted of serious crimes more frequently than he had admitted previously. However, as the court of appeals noted, this testimony could be construed to indicate that he had not previously lied deliberately but "may have been confused as to a distinction between a misdemeanor and a felony, concurrent sentences, and crimes committed while he was incarcerated" (Pet. A–9).

The appellate court concluded (Pet. A–9):

> The testimony in its entirety shows clearly that [petitioner] had and took advantage of a full opportunity to present to the jury the character, background and veracity of the witness Mulvey. Although [petitioner] received some of the information that enabled him to cross-examine more vigorously at a later time than he would have preferred, his cross-examination was complete before the government rested its case. This point is obviously devoid of merit.[4]

4. Counsel for petitioner did not make the initial request for Jencks Act statements by approaching the bench. Rather, he requested them in open court in the presence of the jury. The court's action thereafter was designed to and did put the matter in proper perspective for the jury. The procedure subsequently followed de-emphasized the production of statements. The court below properly found that the trial court acted within the bounds of its discretion. The situation is totally unlike that in *Gregory* v. *United States*, 369 F. 2d 185 (C.A. D.C.), where the court refused to hear the motion at the bench; the court's holding here demonstrates its compatibility with the rules of other circuits.

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[4] The United States Attorney advised the court of appeals that he did not have the FBI "rap sheet" in his possession, nor did he see it prior to the issuance of the subpoena duces tecum. He also stated that he had not deliberately and knowingly withheld the information regarding the number of prior convictions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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